IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6481

CLIFFORD H. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-95

LEWIS S. TOLLETT, Warden,

Petitioner,

v.

WILLIE LEE HENDERSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Over a long period of time, LDF attorneys have handled, here and in other courts, many cases involving the unconstitutional exclusion of blacks from jury venires.** Throughout this period, LDF has handled many jury discrimination cases in which our help has been sought only after blacks have been convicted and in which the issue was not raised at trial by their then counsel. This experience has demonstrated to us the vital importance of the availability of federal post-conviction remedies as often the only

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* Letters of consent from counsel for the petitioners and the respondents in both of these cases have been filed with the Clerk of the Court.

** *E.g., Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972).

available mode to vindicate the most blatant violations of a fundamental right. Therefore, LDF has a particular interest in the outcome of these cases since they raise serious questions as to the continued vitality of both habeas corpus and motions under 28 U.S.C. § 2255 as vehicles by which LDF may carry out its purpose.

Summary of Argument

I.

This Court has held, in a consistent line of cases from *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), through *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Sanders* v. *United States*, 373 U.S. 1 (1963), to *Humphrey* v. *Cady*, 405 U.S. 504 (1972), that a waiver of fundamental constitutional rights can not be presumed from a procedural default. Rather, in a proceeding for post-conviction relief, a federal court can bar relief on the basis of waiver only upon a finding that the defendant himself made a deliberate and understanding decision not to raise the issue at trial.

II.

These principles apply with full force to claims of jury discrimination arising under the Constitution. In neither of the two cases before the Court has such a deliberate choice on the part of the defendant not to raise a challenge to the indictment on grounds of racial discrimination been demonstrated.

III.

Strong considerations of public policy militate against the imposition of any rule of forfeiture that would bar black defendants from obtaining post-conviction relief from un-

constitutional jury selection procedures. Lower federal courts have recognized that failure of defense counsel, without acquiescence by defendants, to raise this issue cannot constitute waiver. Any other holding would result in the undermining of 90 years of efforts of this Court to protect the rights of black defendants indicted and convicted by a white-dominated system of justice.

ARGUMENT

These two cases present to the Court the question whether the rule regarding waiver established by *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and reiterated in *Fay* v. *Noia*, 372 U.S. 391 (1963), apply in cases raising the claim that blacks have been excluded from grand juries in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Thus, they involve, in the context of both federal and state prosecutions, the standards by which a federal court on collateral relief should determine whether there has been an effective waiver of the right to object to the denial of this fundamental constitutional right by failure to comply with procedural rules as to when such a challenge should be made. In *Davis* v. *United States*, No. 71-6481, the issue is whether the simple failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure in and of itself constitutes a waiver barring relief in a 28 U.S.C. § 2255 proceeding. *Tollett* v. *Henderson*, No. 72-95, involves the question as to whether the failure to comply with a similar Tennessee court rule also militates against a defendant being able to raise the claim on habeas corpus brought pursuant to 28 U.S.C. § 2254.

Despite the fact that one case is a federal and the other is a state prosecution, *amicus* urges that both are governed by the rule laid down in *Johnson* v. *Zerbst*, *supra*, that

"'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" and that they "'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464.

I

The Requirements for Finding a Waiver of a Fundamental Constitutional Right in Both State and Federal Courts Require an Affirmative Showing That the Defendant Himself Acquiesced in Their Non-Assertion.

Johnson v. *Zerbst* itself was a collateral attack on a federal conviction, the issue being whether the defendant had waived his right to representation by counsel guaranteed by the Sixth Amendment to the Constitution of the United States. The lower courts had essentially held that the procedural default of the defendant in failing to request appointment of counsel at trial barred relief in the collateral proceeding. This Court unequivocally rejected such a view. Rather, it held that in any case the question was whether there had been "an intelligent waiver" of the right involved and that that finding could be made only after an examination of the particular facts and circumstances surrounding the case demonstrated that the defendant affirmatively decided to forego the right in question. Thus, the mere failure affirmatively to assert the right was not enough to bar collateral relief. 304 U.S. at 464.

The *Johnson* rule was reaffirmed in the strongest possible terms in *Fay* v. *Noia, supra,* which involved a state prosecution, and which held that in a proceeding for col-

lateral relief in federal court, waiver could not be presumed by failure to pursue or follow a particular rule of procedure. To follow such a rule of forfeiture would be to "introduce legal fictions into federal habeas corpus."[1] Thus, the inquiry required by a federal court is to determine:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as a deliberate bypassing of state procedures. . . .
> 372 U.S. at 439.

Then, and only then, "it is open to the federal court on habeas to deny him all relief." *Ibid.* The court reemphasized that the standard required "the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief."

Shortly after the decision in *Fay*, this Court completed the circle by making it clear that the *Fay* standards applied equally in a 28 U.S.C. § 2255 proceeding. *Sanders* v. *United States*, 373 U.S. 1, 18 (1963). And see, *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). As recently as last term, this Court, by a unanimous seven-member panel, reaffirmed that the requirements of *Johnson* and *Fay* were still the law and stated: "If the District Court cannot find persuasive evidence of a knowing and intel-

[1] As the Fifth Circuit has put it, in a case involving jury discrimination: "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default." *Labat* v. *Bennett*, 365 F.2d 698, 707 (5th Cir. 1966).

ligent waiver on the part of petitioner himself, then the Court should proceed to consider petitioner's constitutional claims." Therefore, a defendant "is not necessarily bound by the decision or default of his counsel." *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972).

II

The *Johnson-Fay* Requirements Apply With Full Force to Jury Discrimination Claims in Both State and Federal Courts.

We have set out above the general rule for determining whether there has been a waiver of a fundamental constitutional right. In its terms, the *Johnson-Fay* rule applies to all such rights without exception,[2] and it has in fact been applied in a variety of circumstances. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 370 n. 1 (1964) (challenge to procedural rules governing admission of confessions; the *Fay* rule provides "the *only* ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in the state courts" (emphasis added)); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965) (objection to unconstitutionally seized evidence); *Humphrey* v. *Cady*, *supra* (objection to procedures for commitment as a sex crime offender).

It is clear that the same principle also must apply in cases involving the right to object to discrimination in the selection of juries. It is no overstatement to assert that perhaps no other constitutional right has been recog-

[2] "Nothing in *Fay* v. *Noia* suggests that the Supreme Court intended to establish a hierarchy of constitutional protections and limit the applicability of the classic definition of waiver to those rights occupying the highest positions." *Henderson* v. *Tollett*, 459 F.2d 237, 239 (6th Cir. 1972).

nized by this Court for so long as being absolutely fundamental to the requirements of due process and equal protection. From *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) through *Alexander* v. *Louisiana*, 405 U.S. 625 (1972), this Court has held repeatedly that racial discrimination in the selection of juries violates the most fundamental right to be tried by a system of justice free of racial bias. See also, *Patton* v. *Mississippi*, 332 U.S. 463 (1947), and cases cited at 465 n. 3. The right fully encompasses indictment by grand jury, *Alexander* v. *Louisiana*, 405 U.S. at 626 n. 3.

The applicability of *Johnson* and *Fay* has been duly recognized by federal courts when faced with questions of jury discrimination by states in violation of the Fourteenth Amendment. Indeed, the circuit courts have been unanimous in holding that the right is of the fundamental character contemplated by *Johnson*, and that therefore the failure to comply with state procedural rules will not in and of itself result in a waiver of the right to object to discrimination. Rather, the burden is on the state to demonstrate by affirmative evidence that the decision not to challenge the composition of either the grand or petit jury was deliberately made by the defendant himself with full understanding of the consequences thereof, free from any countervailing coercive pressures. See, *e.g.*, *Wade* v. *Yeager*, 377 F.2d 841 (3rd Cir. 1967); *McNeil* v. *North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964); *Henderson* v. *Tollett*, 459 F.2d 237 (6th Cir. 1972); *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971).

We urge, therefore, that the Sixth Circuit in *Tollett* was correct in its refusal to impose a rule of forfeiture, particularly in view of the facts of the case. Both the district court and the court of appeals conducted precisely the inquiry required by *Johnson*, *Fay*, and *Humphrey*. They

found that not only the petitioner, but his counsel were unaware of even the possibility of challenging the composition of the grand jury, and that the idea would not have occurred to *any* Tennessee lawyer at the time. Therefore, there was clearly no decision at all on the matter, let alone one made for tactical reasons.[3]

None of the State's grounds for escaping the application of *Johnson* and *Fay* are persuasive. The argument that the jury selection methods used in 1948 were not unconstitutional under the prevailing law at the time is simply wrong. No blacks ever served on a grand jury in the history of the county until 1953, five years after Henderson's indictment, in a county more than 25% black. This was precisely the kind of facts held to establish a *prima facie* case of jury discrimination in *Norris* v. *Alabama*, 294 U.S. 587 (1935), and *Neal* v. *Delaware*, 103 U.S. 370 (1881), decided thirteen and sixty-seven years, respectively, before the indictment was handed down in this case.

The argument that Henderson's counsel may not have raised the issue because he decided it would be futile to do so because of recent decisions of the Tennessee Supreme Court is not supported by the record. To the contrary, it

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[3] Indeed, with one exception, it is difficult to imagine *any* constitutionally acceptable tactical reason for not challenging racial discrimination in the composition of juries. Fear of arousing hostility in the white community on the part of counsel is not, of course, an acceptable reason for not making a challenge, see *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964), *cf.*, *Fay* v. *Noia*, 372 U.S. at 439-440, despite the State of Tennessee's assertions to the contrary here (Brief for Petitioner in No. 72-95, p. 6). The one exception would be a case where counsel and the defendant deliberately decided not to object to the array on the hope of getting a second opportunity to contest a conviction if an appeal on other grounds failed. Such a state of facts might well amount to an abuse of the remedy of habeas corpus or 2255 within the meaning of *Sanders* v. *United States*, 373 U.S. 1, 9-11 (1963). In neither of the two cases before the court was such an abuse either pleaded or proven.

simply never occurred to counsel that any such claim existed.[4]

Finally, the fact that Henderson pleaded guilty to the crime charged does not put him in a different position *vis-a-vis* his right to challenge his indictment than a defendant who has gone to trial. This Court has repeatedly held that the right to challenge an unconstitutional grand jury is independent of the right to challenge the petit jury, and that the same principles apply to each. See, *Alexander* v. *Louisiana*, 405 U.S. at 626, n. 3. Thus, it has rejected the position that discrimination in the selection of the grand jury is of no moment since an indictment is not a conviction and any defect is cured by trial before a constitutionally acceptable petit jury. *Pierre* v. *Louisiana*, 306 U.S. 354 (1939). See also, *Hill* v. *Texas*, 316 U.S. 400, 406 (1942). No more than does a judgment of guilty by a jury, after a full trial (see, *Cassell* v. *Texas*, 339 U.S. 282 (1950), does a plea of guilty wipe out the action of an unconstitutional grand jury.[5]

Furthermore, it cannot be maintained that the plea of guilty itself operated as a waiver of all objections to constitutional infirmities in the proceeding. Such a contention

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[4] Even if supported by the evidence, the argument proves too much. Surely, counsel's decision, not acquiesced in by the defendant, not to raise a valid issue because he thought it could not be won, is not a decision made by the defendant with knowledge of what he is surrendering as contemplated by *Johnson* and *Fay*.

[5] If anything, the opposite should be the case. If in fact a defendant has had a trial before a constitutionally adequate petit jury it would be at least appear that there is not the kind of abrogation of Fourteenth Amendment rights of black defendants by the entire judicial system. This court has indicated that particular attention must be given to guilty plea cases to ensure that there has been no violation of constitutional rights, precisely because the defendant has given up the procedural protections inherent in a jury trial. See, *Boykin* v. *Alabama*, 395 U.S. 238, 242-44 (1969); *Rice* v. *Olson*, 324 U.S. 786 (1945).

was specifically rejected by this Court in *Rice* v. *Olson*, 324 U.S. 786 (1945). There, the Court rejected the position that when a defendant pleads guilty it can be presumed that he "'absolutely' and finally" waived his right to be represented by counsel. 324 U.S. at 788. It was noted that the holding of the state court was based on the proposition that such a plea "'operates as a waiver of any defense, and . . . with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions.'" *Id.*, n. 2.

This Court held to the contrary, pointing out that such a presumption could not be maintained in the face of an allegation by the defendant in his petition for collateral relief that he did *not* waive the right in question. That allegation "squarely raised a question of fact" that could not be resolved by any presumption drawn from the bare fact of a guilty plea. Rather, it must be "determined by evidence" going to the issue, *inter alia*, of whether the defendant waived his right "intelligently and understandingly." *Id.* at 788-789. See also, *Carnley* v. *Cochran*, 369 U.S. 506, 515-516 (1962); *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

In *Tollett*, of course, the precise issue is whether Henderson "intelligently and understandingly" gave up his right to challenge the composition of the grand jury. No more than was the case in *Rice* v. *Olson* can that question be resolved by reliance on a presumption attaching to a plea of guilty. Rather, the courts below made the inquiry mandated by *Rice* and determined on the basis of the evidence that no understanding waiver had been made. *Winters* v. *Cook*, 466 F.2d 1393 (5th Cir. 1972).

In summarizing our position with regard to *Tollett*, we urge that the courts of appeals have been correct in deciding waiver questions pursuant to the standards estab-

lished in *Johnson* and *Fay*. This court should therefore affirm the Sixth Circuit's decision, and uphold the courts of appeals' approach in cases raising the issue of the availability of habeas corpus relief in state jury discrimination cases.

Paradoxically, in cases involving *federal* prosecutions, where relief under § 2255 is sought on the basis of jury discrimination, the lower courts have been much less consistent in applying the standards of *Johnson* and *Fay*. The Fifth Circuit in particular, which has been diligent in protecting the rights of *state* prisoners from the application of a strict rule of waiver for non-compliance with procedural rules, has, on the other hand, rigidly applied a rule of forfeiture in federal prosecutions regardless of the circumstances. Thus, in the *Davis* case the court, relying on a series of earlier decisions, held simply that failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure, operated as an automatice forfeiture of the right of a black defendant to object *on constitutional grounds* to the exclusion of blacks from the grand jury that indicted him.

Amicus urges that there is no basis in law or reason for this inconsistent result, but that it flies in the face of this Court's decisions from *Johnson* through *Humphrey*. The Fifth Circuit has mechanically applied the decision in *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341 (1963), to all instances where a federal defendant has not challenged his jury prior to the time of trial, and we contend that this automatic reliance on *Shotwell* is misplaced and that that case is distinguishable.

In *Shotwell*, corporate defendants raised a question as to the legality of the composition of the jury on the appeal itself some years after the original trial. The grounds for

the challenge in *Shotwell* were based on alleged violations of the federal jury statutes and the defendants relied upon this Court's supervisory power over the administration of those statutes in the lower federal courts. See, *Ballard* v. *United States,* 329 U.S. 187 (1946). The claim was apparently not made that members of the defendants' own class were excluded from jury service, but that, because of improper administrative action, the statutes' requirement that a cross-section of the community be empanelled was not met. Thus, under the law prevailing at the time, the claim made in *Shotwell* was evidently not viewed by this Court as one of constitutional dimension.[6] Similarly, the cases cited with approval in *Shotwell,* 371 U.S. at 362, all deal with challenges based on violations of federal statutory rights as declared by this Court in cases such as *Ballard* v. *United States, supra,* and *Thiel* v. *Southern Pacific Company,* 328 U.S. 217 (1946).[7]

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[6] We do not wish to imply by this discussion of *Shotwell* and the cases it relied upon that we do not believe that there is a right guaranteed by the Constitution to a jury that represents a reasonable cross-section of the community. See, *Carter* v. *Jury Commission,* 396 U.S. 320, 330 (1970). Indeed, our contention would be to the contrary if these cases raised that issue, and we have urged that position before this Court in *Alexander* v. *Louisiana, supra.* The point here, however, is that that proposition was not firmly established at the time of *Shotwell.* See, *Fay* v. *New York,* 332 U.S. 261 (1947).

[7] The cases cited with approval in *Shotwell,* 371 U.S. at 362, all raised claims of statutory violations, and evidently did not urge constitutional ones that were deemed to be substantial. *E.g., Frazier* v. *United States,* 335 U.S. 497 (1948) and *Higgins* v. *United States,* 160 F.2d 222 (D.C. Cir. 1946) challenged juries composed largely of government employees. *Hanratty* v. *United States,* 218 F.2d 358 (5th Cir. 1955) and *Miranda* v. *United States,* 255 F.2d 9 (1st Cir. 1958) challenged the exclusion of women. In *Scales* v. *United States,* 367 U.S. 203 (1961), the challenge was based on procedures alleged to be inconsistent with the statutes; although Rule 12(b)(2) was referred to, the trial court, the Court of Appeals, and this Court all also rejected the claim on the merits. *Id.* at 259.

Thus, this Court in *Shotwell* was not presented with a case raising the question of whether the *Johnson* standard of waiver applied in a collateral proceeding by a black defendant seeking to challange jury discrimination on constitutional grounds arising from the exclusion of blacks from juries. Therefore, it is not surprising that the same court that decided *Fay* two months later and that in the same term held in *Sanders* v. *United States*, 373 U.S. 1 (1963) that the *Johnson-Fay* standards applied in federal collateral proceedings, did not discuss the applicability of *Johnson* v. *Zerbst* in *Shotwell*. For if *Shotwell* and Rule 12(b)(2) are read the Fifth Circuit's way, as creating a rule of forfeiture, they are clearly in conflict with *Johnson*, *Fay* and *Sanders*.

Sanders involved the standards for deciding whether a defendant was barred from raising a constitutional claim in a second § 2255 petition that might have been raised in an earlier one. The district court applied what was essentially a rule of forfeiture, and held that the failure to raise the issue at the earlier opportunity operated as a bar. Such a ruling is precisely analogous to the Fifth Circuit's position that a failure to comply with Rule 12(b)(2) operates as a similar bar. This Court in *Sanders* rejected such a rule, and applied the *Fay* holding that a deliberate decision on the part of the defendant not to raise the issue for a tactical or other reason must be shown. Thus, the Ninth Circuit correctly recognized that *Sanders* controlled in its holding that a failure to comply with 12(b)(2) did not operate as an automatic forfeiture of the right to challenge jury discrimination. *Fernandez* v. *Meier*, 408 F.2d 974 (9th Cir. 1969).

The same ground we have discussed for distinguishing *Shotwell* also leads to a conclusion that 12(b)(2) does not conflict with *Johnson* and *Fay*. The rule by its terms allows

a court to find no waiver "for cause shown." That language must be read in conformity with the *Johnson-Fay* rule to mean that sufficient cause is established by: (1) the assertion of a constitutional challenge to the grand jury; and (2) the determination by the court that the defendant himself did not participate "knowingly and understandingly" in a deliberate decision not to raise the issue before trial. Thus, whatever the validity of a rule that would require that ordinarily *statutory* challenges to a grand jury be made pursuant to 12(b),[3] challenges on constitutional grounds must be subject to a different standard.

The Fifth Circuit apparently gave no consideration to this distinction in *Davis*, for his motion filed under § 2255 specifically challenges his grand jury "as being an unconstitutional array" since it did not meet the requirements of "the Fifth Amendment of the United States Constitution" as well as those of the federal jury statutes, 28 U.S.C. §§ 1861-1864. Thus, the Fifth Circuit has adopted precisely the rule rejected by this Court in *Johnson* v. *Zerbst*, and its reliance on *Shotwell* and its reference to Rule 12(b) amounts to a holding that the simple failure to comply

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[3] We note in passing that the 1968 Amendments to the federal jury statutes seem to recognize the distinction between a challenge based on noncompliance with the statutes and challenges based on other grounds and the procedural requirements for mounting such a challenge. 28 U.S.C. § 1867 sets forth the required procedure for challenging noncompliance with sections 1861-1864 and requires that such challenges be made before the *voir dire* examination begins or earlier if the noncompliance was or could have been discovered. Section 1867(e) states that "the procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title." The section then goes on to state that it does not preclude the pursuit of other remedies to vindicate any other law, including the Fifth Amendment to the Constitution, prohibiting racial discrimination in the selection of juries.

with that rule in and of itself constitutes a waiver of the constitutional right involved.

It is clear that the lower courts did *not* make the inquiry or find the facts required by *Johnson, Fay* and *Sanders*. The district court placed the burden *on the defendant* to prove somehow that he was not aware of his constitutional rights, and presumed that because of his present legal knowledge and the fact that he had a capable lawyer, he must have known of them. Such a presumption stands *Johnson* on its head, and is, of course, improper. See, *Glasser* v. *United States*, 315 U.S. 60, 70-72 (1942), holding that an *assistant United States attorney* could not be presumed to know of his right to be represented by independent counsel and to have waived it by inaction.

Finally, the lower court's holdings that some special prejudice must be shown in a racial exclusion case in order to escape the requirements of 12(b)(2) cannot be sustained. Whatever may be the validity of that part of the *Shotwell* holding as it relates to the right of persons not of the excluded class to challenge noncompliance with the federal jury statutes, it cannot be the rule in the case of a black defendant challenging the unconstitutional exclusion of blacks.

Indeed, it is clear that a defendant of any race can challenge the exclusion of blacks without any showing of particularized prejudice to him, *Peters* v. *Kiff*, 407 U.S. 493 (1972). In *Peters*, this Court rejected, in the context of a state prosecution, the argument that a white defendant had to show such prejudice because he had not challenged the exclusion of blacks from his jury until he sought collateral relief. The Court held that the fundamental impossibility of demonstrating such prejudice made it unfair to place such a burden on the defendant in a situation where the state was responsible for the continuation of practices that were unconstitutional.

III

Any Rule Imposing an Automatic Forfeiture for Failure to Comply With Rules of Procedure Is Particularly Inappropriate in Jury Discrimination Cases.

In parts I and II, of this brief, we have set out the general rule regarding the waiver of constitutional rights and have explained why it applies to jury discrimination cases under the rationale of *Johnson* and *Fay* since they involve a fundamental constitutional right as contemplated by those decisions. Here we urge that other considerations peculiar to the problems raised by racial discrimination in the selection of juries dictate that as a matter of policy a strict rule of forfeiture may not be permitted. This is because jury discrimination by its nature has been a systematic, institutionalized defect in the administration of justice in this country, despite 90 years of pronouncements by this Court.

Amicus has a special concern with the problem of racial discrimination in the selection of both grand and petit juries, not only in the South but throughout the United States. In our statement of interest, *supra*, we have noted a long-standing involvement in jury discrimination problems in cases before not only this Court but in lower courts, both state and federal. Because of our experience, we are often contacted by black prisoners who wish assistance in challenging their indictments or convictions because of such discrimination. These requests for help show a consistent pattern which is typified by the two cases before the Court.

A black defendant, without resources and with little knowledge of his legal rights at the beginning of his prosecution, is represented by either retained or court-appointed

counsel, usually white. He is indicted and goes to trial, at which point he may for the first time realize that he is faced with an all or virtually all-white jury array. Of course, he has had no way of knowing the racial composition of the grand jury that indicted him. In most instances, his counsel does not mount a challenge to the jury system as it relates either to the grand or petit jury and the black defendant becomes aware of his right to do so only after he has been convicted and incarcerated and subsequently becomes more acquainted with his legal rights.

The reasons why jury discrimination challenges have not been made more often, despite the evident fact that they could have been in virtually every prosecution brought in southern states and in a substantial portion of those brought in northern states, are not difficult to ascertain. The number of black lawyers and white lawyers cognizant of civil rights issues, those who would be most apt to be concerned about the problem, has been and remains small, particularly in southern states. See, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 443 (1963), *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968), *Sobol* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

Thus, black defendants are in the main represented in the first instance by white attorneys whose main experience is with representing white clients. Unfortunately, these lawyers simply do not raise jury discrimination issues in the large run of cases. In the northern states, and now in some southern states, this may be because of the failure to recognize that there in fact may be a problem. This is not surprising because the typical northern situation involves not so much the kind of deliberate discrimination typical of many southern jurisdictions, but rather the use of various devices that have the effect of excluding black jurors. See, *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971),

Smith v. *Yeager*, 465 F.2d 272 (3rd Cir. 1972). With few exceptions, it has only been in recent years that such practices have come to light and their constitutional significance has been recognized.

The same pattern, we believe, also explains the relatively few challenges on racial exclusion grounds to jury selection methods in federal courts. The pattern there again has not been by and large deliberate exclusion of blacks but rather the utilization of selection methods, such as the key-man system, which, however inadvertently, have had the effect of excluding blacks. See, *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966). In *Davis* v. *United States*, of course, precisely such a contention, together with allegations of deliberate exclusion, was made.[9]

In southern jurisdictions ignorance of the possibility of challenging grand and petit juries has in the past, unfortunately, been coupled with the deliberate neglect or tacit acquiescence of white attorneys in the maintenance of an exclusionary jury system. *Tollett* v. *Henderson* presents a vivid example of such a case. Counsel who represented Henderson in Tennessee in 1948 frankly admitted that it simply never occurred to him to challenge racial discrimination in the jury selection system. Similarly, Judge Galbreath of the Court of Criminal Appeals of Tennessee, in his concurring opinion in respondent's collateral proceeding in that court, stated:

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[9] Congress itself has long grappled with problems arising from the racially exclusionary effects of key-man and similar systems in the federal courts. The result of this concern was the passage of the 1968 Jury Selection Act, 28 U.S.C. § 1861 et seq., which sets up a random system of selection from sources which are designed to produce as full a cross-section of the community as possible. With the implementation of this act, jury discrimination problems in the federal courts have, with a few exceptions, been largely eliminated. Petitioner Davis, of course, was indicted and tried prior to the effective date of the 1968 reform.

> No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade. 459 S.W.2d 176, 179-180.

Similarly, the Fifth Circuit has taken judicial notice of the fact that white lawyers simply would not raise the issue because of ignorance of the issue, because of fear of raising hostility in the community, or because of acquiescence in the system. See, *United States ex rel. Goldsby* v. *Harpole,* 263 F.2d 71, 82-83 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman,* 304 F.2d 53, 68-69 (5th Cir. 1962); *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964); *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964); *Winters* v. *Cook,* 466 F.2d 1393 (5th Cir. 1972).

In light of these realities, a rule that essentially operates as a forfeiture of the right to challenge discrimination in the selection of grand, and presumably petit, juries would mean that blacks would be condemned to remain in prison without recourse even though they were indicted and convicted under procedures blatantly unconstitutional, adhered to in the face of decisions of this Court going back to 1880. These defendants would be placed in this situation through no fault of their own but simply because of defense counsel's essential acquiescence in the system, or their ignorance of the possibility of challenging it.

Thus, these cases concern a fundamental and institutionalized defect in the system of justice that simply cannot be compared to, for example, a decision in a particular case to forego challenging evidence as unconstitutionally seized, or a statement as unconstitutionally coerced. It would be unconscionable to place the burden of the legal

profession's failure to attack this problem on the shoulders of the very persons that this Court has been endeavoring to protect for 92 years.

These considerations also require that the prosecution's claim of an interest in the finality of criminal convictions be rejected. The problem of jury discrimination is one peculiarly within the state's power to correct. It is not a question of the malfeasance or mistake of one police officer in seizing evidence, or of an interrogator or prosecutor overstepping the bounds set by the Constitution in obtaining a confession, on a single judge making an erroneous decision as to a constitutional question arising from the particular facts of a particular case. Rather, an entire system has been maintained with full knowledge of its unconstitutionality, with the active participation of all elements of the very institutions supposed to be on the side of justice, including judges, district attorneys, court personnel, and, unfortunately, in many cases defense counsel. The institutions of government have chosen to violate the Constitution of the United States, not in one individual case, but in every case involving every defendant brought before it. If any party has waived or forfeited its right to insist on a particular interest it is the government itself, and this Court should ensure that all persons convicted under unconstitutional systems of jury selection be able to gain relief, unless they themselves, with full knowledge of the consequences, deliberately chose to forego their rights.

CONCLUSION

For the foregoing reasons, the decision in No. 71-6481 should be reversed and that in No. 72-95 affirmed.

Respectfully submitted,

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